IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,578

LAURENCE DAVIS, *Appellant,*

v.

NORMAN M. LITTELL, *Appellee.*

Appeal from the United States District Court for the District of Arizona

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APPELLANT'S OPENING BRIEF

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I. JURISDICTION

Jurisdiction of the District Court was based on diversity of citizenship under 28 U.S.C. § 1332. At the time of filing the original and the amended complaints, plaintiff was a citizen of Arizona and defendant a citizen of Maryland. The amount in controversy exceeded $10,000. Complaint, par. I (T.R. 1); Amended Complaint, Count I, par. I (T.R. 30); Answer, par. I (T.R. 61). This Court has jurisdiction by virtue of 28 U.S.C. § 1291.

II. STATEMENT OF THE CASE

This is a claim for libel and slander. The defendant, Littell, was general counsel of the Navajo Tribe and plaintiff, Davis, was one of the assistant general counsels. Both are non-Indians. They were employed under a contract approved by the Secretary of the Interior for part-time services, and maintained separate offices off the Navajo Reservation.[1] For reasons of his own Littell wished to have Davis fired.[2] The latter was well thought of by Tribal officials; therefore it was impossible for Littell simply to ask for his dismissal; instead he carried out a slander campaign, accusing Davis of corrupt connections with various interests asserted to be inimical to the Tribe, and in this way destroyed his support among the Tribal officials and secured his dismissal. Even after the dismissal, Littell's slander compaign continued, with an attempt to poison the press against Davis.[3] Davis suffered severe loss of income in consequence, as well as damage to his moral and professional reputation which may not ever be fully ascertained.

This case was decided upon motion for summary judgment. For the first time, in this motion filed some five years after the Complaint, defendant claimed absolute privilege for his slanders, on the ground that he was a

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1 See Request for Admissions of Fact and Genuineness of Documents (Second Set), T.R. 140, and defendant's answer thereto, T.R. 156. A copy of the contract, admitted to be genuine, appears at T.R. 143-155.

2 Since there has been no trial, Littell's motives for wanting Davis dismissed have not been disclosed in this record. Subsequent to his slanders of Davis, Littell's general counsel contract with the Navajos was terminated by the Secretary of the Interior for diverting his clients' assets to his own use and other forms of overreaching. It is now obvious that Littell dared not long tolerate as his associate on the Navajo contract an honest and knowledgeable man. See Udall v. Littell, 366 F. 2d 668 (D.C. Cir. 1966), cert. denied, 385 U.S. 1007 (1967). At the time the slanders of Davis were published, however, Littell's true character was not generally known; hence his lies were still capable of doing damage.

3 Amended Complaint, T.R. 30-48.

public official.[4] The court below granted the motion. T.R. 121, 159.

On February 18, 1963, defendant had filed a counterclaim, accusing plaintiff of libel by publishing the original complaint (T.R. 49). After the District Court granted defendant's motion for summary judgment, plaintiff filed a motion for summary judgment against defendant's counterclaim. This was denied. See minute entries, T.R. 181-182. The current status of the case in the District Court, thus, is that Davis is not only barred from seeking damages for Littell's lies about him, but must defend Littell's $200,000 claim because he dared bring the instant suit and distribute copies of the complaint in an effort to rehabilitate his reputation with some of the persons to whom Littell had published his slanders.

Final Judgment with a Rule 54(b) determination requiring this piecemeal appeal was entered over plaintiff's objection on October 13, 1966. T.R. 167. Cf. minute entries, October 28, November 10, 1966. T.R. 181.

III. SPECIFICATION OF ERROR

The District Court erred in granting defendant's motion for summary judgment, and in entering final judgment for the defendant, on the ground that defendant was entitled to executive privilege. This was error because the law does not grant immunity from tort liability to contract attorneys for an Indian tribe.

IV. ARGUMENT

Summary

The decision of the court below, that the general counsel of an Indian tribe enjoys absolute privilege, is, we believe, wholly unprecedented. Based on the mechanistic extension of a rule of Federal common law to a field where it

[4] An earlier motion to dismiss was denied on May 20, 1963. See Minute Entries, T.R. 179.

is inapplicable, it overlooks the compelling policies of State law, Federal statute, and judicial decisions, which demand exactly the opposite conclusion. By leaving defendant free to seek damages from the plaintiff for daring to sue him, it indeed vests this unworthy former attorney for an Indian tribe with a tyrannous power denied every public official in the United States.[5]

1. The Federal law of executive privilege

The doctrine of executive privilege grew out of *Spaulding* v. *Vilas,* 161 U.S. 483 (1896), where the Postmaster General of the United States was held immune from liability for statements contained in a circular to local postmasters. At first confined to libel cases, it was extended to other torts and to subordinate officials by *Gregoire* v. *Biddle,* 177 F. 2d 581 (2d Cir. 1949), cert. denied 339 U.S. 949 (1950).[6] The Supreme Court approved the extension to subordinates in *Barr* v. *Matteo,* 360 U.S. 564 (1959), and *Howard* v. *Lyons,* 360 U.S. 593 (1959). The rule is one of Federal common law, available as a defense to private citizens' claims made under State law against Federal officers.[7]

Defendant Littell does not even claim to be a Federal officer, but the officer of an Indian tribe. Hence merely stating the *Vilas-Gregoire-Barr* rule shows its inapplicability to the case at issue.

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5 Cf. Garrison v. Louisiana, 379 U.S. 64 (1964).

6 Cf. Bershad v. Wood, 290 F. 2d 714 (9th Cir. 1961), which discusses the law prior to Gregoire.

7 "When it comes to suits for damages for abuse of power, federal officials are usually governed by local law. See *e.g., Slocum* v. *Mayberry,* 2 Wheat. 1, 10, 12. Federal law, however, supplies the defense, if the conduct complained of was done pursuant to a federally imposed duty (see, *e.g., Mayor* v. *Cooper,* 6 Wall. 247; cf. *Tennessee* v. *Davis,* 100 U.S. 257), or immunity from suit. See *Barr* v. *Matteo, supra; Howard* v. *Lyons, supra.*" Wheeldin v. Wheeler, 373 U.S. 647 (1963).

2. State law governs the plaintiff's claim

Nine of Littell's slanders about the plaintiff were published in Arizona and one in the District of Columbia. See Amended Complaint, T.R. 30-43. Although both plaintiff and defendant were retained at the time by the Navajo Indian Tribe, they are both non-Indians. Navajo Tribal law does not even purport to govern the relations of non-Indians with each other;[8] and it has long been held that such matters are within State jurisdiction. *Langford* v. *Monteith,* 102 U.S. 145, 147 (1880); *United States* v. *McBratney,* 104 U.S. 621 (1881); *New York ex rel. Ray* v. *Martin,* 326 U.S. 496 (1946).

Arizona and District of Columbia law, therefore, clearly govern the plaintiff's claims here.

3. No State law extends Executive privilege to a non-Indian contract attorney for an Indian Tribe

We have discovered no statute or judicial decision of either Arizona or the District of Columbia according absolute privilege to the slanders of an attorney for an Indian tribe. The decision of the District Court in this case is therefore a new departure. In the next section of the brief we shall discuss why it is unwise; here we emphasize that it is unsupported by authority.

The trial judge in his order of September 27, 1966 (T.R. 159), cites only one Arizona case, *Long* v. *Mertz,* 2 Ariz. App. 215, 407 P. 2d 404 (1965). It is a decision of the intermediate appellate court of the State and holds that a public officer of Arizona is absolutely immune from liability for a statement made in the course of his duties. An earlier case in the State Supreme Court, not cited by the trial court here, *Connor* v. *Timothy,* 43 Ariz. 517, 33 P. 2d 293 (1934), held that a slander published by one school board member to another in an official meeting had

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[8] Navajo Tribal Code, Title 7, § 63. (Tribal courts have civil jurisdiction only where the defendant is an Indian.)

only qualified privilege. Neither case is a precedent for extending privilege to a non-Indian contract attorney for an Indian tribe. To do so is to make new law, which always ought to be done only on the basis of a careful evaluation of the conflicting values and policies involved. We contend that the District Court falsely weighed the values and policies at stake, if indeed it can really be said to have weighed them at all.

4. Absolute immunity from tort liability ought not to be extended to tribal attorneys

Judge Learned Hand justified the rule of absolute immunity for Federal officers by writing:

> ". . . it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (1949).

The *Gregoire* case arose in wartime. The plaintiff claimed malicious prosecution and false imprisonment when the Attorney General of the United States and several of his subordinates locked him up on Ellis Island as a German enemy alien, though he was in fact a Frenchman.

Although several State courts have latterly adopted a rule similar to *Barr* and *Howard* to grant State officers absolute immunity from libel claims,[9] they have not followed the full sweep of *Gregoire* and granted all their officials absolute immunity from tort liability for all acts

[9] E.g., Long v. Mertz, 2 Ariz. App. 215, 407 P. 2d 404 (1965); Matson v. Margiotti, 371 Pa. 188, 88 A. 2d 892 (1952).

within the scope of their authority. In fact, they cannot; for the very same acts which would be absolutely privileged under *Gregoire* if done by a Federal officer, may give rise to statutory liability of State officers under the Civil Rights Act of 1871 (42 U.S.C. § 1985).[10] The Federal rule of absolute immunity presumes a very high degree of trustworthiness in Federal officers, one the law does not accord to State officers, much less to contractors with Indian tribes.

To a large extent, the Federal rule of absolute immunity is judicial legislation to enforce the Supremacy Clause.[11] This is starkly shown in *Norton* v. *McShane,* 332 F. 2d 855 (5th Cir. 1964), cert. denied, 380 U.S. 981 (1965), which was a suit against the Chief U. S. Marshal, the Deputy Attorney General, and others, for false imprisonment at the time of the Oxford, Mississsippi, riots. As applied in *Norton,* the immunity rule amounts to the same thing as the "political question" doctrine of *Georgia* v. *Stanton,* 6 Wall. 50 (1867). It says, in effect, that the courts are not the proper forum for controlling the efforts of the executive to preserve the Nation in time of great public peril.

It is perfectly obvious that the policy underlying *Gregoire, Norton,* and similar cases, has nothing to do with the part-time general counsel of an Indian tribe.

Extending the rule of *Spaulding* v. *Vilas* to the libels of subordinate officers, on the authority of *Gregoire,* was not undertaken without qualms by the Supreme Court. *Barr* and *Howard* were five-to-four decisions, and the five-justice majority could not even agree on a single Opinion of the Court. Two of the majority have since left the bench, and one is about to do so. These are shaky precedents indeed. The Supreme Court has already drawn the line against further extension of absolute immunity. In

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[10] Cf. Norton v. McShane, 332 F. 2d 855 (5th Cir. 1964).

[11] U.S. Const., Article VI, Clause 2.

Dombrowski v. *Eastland,* No. 118, October Term 1966, decided *per curiam* as recently as May 15 of this year, it has refused to accord immunity to subordinate officials of the legislative branch. Surely if the counsel of a committee of the United States Senate is not entitled to absolute immunity, neither is the counsel of an Indian tribe.

The Courts of Appeals have not been wholly happy with the enshrinement of *Gregoire.* This court had its qualms in *Hughes* v. *Johnson,* 305 F. 2d 67 (9th Cir. 1962), and *S. & S. Logging Co.* v. *Baker,* 366 F. 2d 617 (9th Cir. 1966). The Fifth Circuit raised the question of whether the immunity doctrine has not gone too far in *Chaflin* v. *Pratt,* 358 F. 2d 349, note 9 at page 353 (1966). The First Circuit has plainly refused to follow *Gregoire* in *Kelley* v. *Dunne,* 344 F. 2d 129 (1965), writing the following wise words (at page 133):

> ". . . since the doctrine of absolute immunity is based upon the relative importance of the public, as against a private, interest, application of the doctrine must vary with the relative weight of the competing interests. In the cases in which private rights have been foreclosed, free exercise of the public function has been considered highly important."

All reason militates against the mechanistic extension of absolute immunity to the non-Indian contract counsel for an Indian tribe, especially in the instant case. There is here no war or national emergency, no question of Federal supremacy, not even any possibility of interference with any interest of the Navajo Tribe, since defendant Littell has already been removed, for misconduct, as its counsel. And the degree of trustworthiness presupposed in the carefully selected Federal officer is wholly lacking in the contract attorney.

Indeed, Littell never was a public official, even of the Navajo Tribe, at any time material hereto. The analogy between the attorney general of a State and a part-time

attorney having the duties described in his contract (T.R. 143-155) is too facile.[12] On this point there is a direct precedent. *Adams* v. *Murphy*, 165 Fed. 304 (8th Cir. 1908), squarely holds that the general counsel of an Indian tribe is not a public officer.[13] In regard to Littell himself, the D.C. Circuit has aptly stated:

> "In general, and for present purposes, Appellee's relationship to the Tribe was not unlike that of a private practitioner representing a business enterprise having a variety of recurring legal problems the scope

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12 The sections of the Navajo Tribal Code, Title 2, §§ 821-823, dealing with the duties of the general counsel, are merely descriptive, having been adopted subsequently to execution of the contract. Since the contract and every amendment of it required approval by the Secretary of the Interior (25 U.S.C. § 81), the Tribe was in fact unable to prescribe Littell's duties by law. Such was Littell's own position in prior litigation before this court. In Littell v. Nakai, 344 F. 2d 486 (9th Cir. 1965), he sued the Chairman of the Tribal Council, a true public official of the Tribe, for tortious interference with the contract, which he claimed was governed solely by the laws of the United States. This court recognized that Littell's rights originated in the laws of the United States (at page 488), but held the interpretation of the contract to be within exclusive tribal jurisdiction.

13 The usual tests for "public office" are the following:

Creation by constitutional or statutory provision. 67 C.J.S. 113, Officers, § 5(b) (4).

Incumbent not engaged by contract. Id. § 6, p. 117.

Position involves a delegation of some part of sovereign power. Tomaris v. State, 71 Ariz. 147, 224 P. 2d 209 (1950); 67 C.J.S., Officers, § 5(b) (2), p. 110; Martin v. Smith, 1 N.W. 2d 163, 140 A.L.R. 1076 (Wis. 1941).

Incumbent must take oath of office. 67 C.J.S., Officers, § 5(b) (5), p. 114, 140 A.L.R. 1092, cf. Arizona Revised Statutes, § 38-231.

Full time rather than intermittent duties, excluding other employment. 140 A.L.R. 1087.

Citizenship in the sovereignty creating the office. 67 C.J.S., Officers, § 13, p. 127, cf. A.R.S. § 38-201.

Express designation by law of the position as a public office. See Navajo Tribal Code, Title 2, § 822:

> "An attorney and associate attorneys shall be *employed* to act as General Counsel for the Navajo Tribe."

And compare, § 881:

> "There is created the *office* of the Executive Secretary of the Tribe."
>
> [Emphasis supplied]

> of which is reasonably well established and sufficiently predictable to relate to a fixed retainer fee." *Udall* v. *Littell,* 366 F. 2d 668, 670 (1966).

It is a non sequitur to state that because the Navajo Tribe is a public body and Littell performed duties for it under contract, therefore he is entitled to absolute immunity for tort liability within the scope of those duties. By such reasoning, the general counsel of a public power district would have absolute immunity; although the general counsel of a privately-owned electric utility, whose actual duties are almost identical, would not. By such reasoning, every contractor building a road for the State Highway Department would be free to run over members of the public with his bulldozers.

It is true that Littell actually did perform work for the Navajo Tribe beyond that prescribed by his contract. Defense counsel, in the motion for summary judgment, referred to him as "the chief non-Indian adviser to the Tribe on matters of policy as well as of law." (T.R. 122). But he achieved this position not by public office, nor by contract, but by usurpation.

This court is well aware of some of the defendant's efforts to retain his usurped power over the Navajos, after they had elected a new chairman on the platform of "Littell must go," and even after the Secretary of the Interior terminated his contract for overreaching.[14] The element of trustworthiness presupposed of Federal, and to a lesser extent of State, officers is wholly lacking.

It is bad law and worse morality to give such a usurper, as the court below does, absolute immunity to the tort claims of his victims, as if he were a public officer. As

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[14] See Littell v. Nakai, 344 F. 2d 486 (9th Cir. 1965); Udall v. Littell, 338 F. 2d 537 (D.C. Cir. 1964); Littell v. Udall, 242 F. Supp. 635 (1965); Udall v. Littell, 366 F. 2d 668 (D.C. Cir. 1966), cert. denied, 385 U.S. 1007 (1967), rehearing denied, 87 S. Ct. 952.

Justice Frankfurter said in *National Labor Relations Board* v. *Coca Cola Bottling Co.*, 350 U.S. 264, 269 (1956):

> "Officers normally means those who hold defined offices. It does not mean the boys in the back room or other agencies of invisible government . . ."

The Federal government and the States have a strong interest, in appropriate cases, to encourage their respective public officers to do their duty without fear of reprisal, but they also have a strong interest in protecting their citizens from malicious onslaughts against reputation and means of livelihood. This appeal ought to be decided by weighing the latter interest against whatever public policy may favor irresponsibility in contract attorneys for Indian tribes, and not by the mechanical extension of a rule of total immunity to an area where the policy and presuppositions that impelled its adoption have no application.

Since the split decision in *Barr* and *Howard,* the Supreme Court itself has reemphasized the "traditional concern of the State to protect its citizens against defamatory attack,"—in a setting where Federal preemption was urged as a defense. *Linn* v. *United Plant Guard Workers,* 383 U.S. 53, 57 (1966).

Save where the defendant is an undoubted public officer of the executive branch, clearly acting within the scope of his public duties,[15] the interest of the wronged citizen ought to receive the greater weight.[16]

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[15] Cf. Wheeldin v. Wheeler, 373 U.S. 647 (1963), for the current disposition of the Supreme Court to restrict the "perimeter" referred to in Barr and Howard; and see Dombrowski v. Eastland, No. 118, October term 1966 (May 15, 1967).

[16] In anticipation of the answering brief, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), Garrison v. Louisiana, 379 U.S. 64 (1964), and Rosenblatt v. Baer, 383 U.S. 75 (1966), should be distinguished here. These cases deal with libel *of* a public *figure,* not libel *by* a public *officer.* They hold such libels enjoy qualified, not absolute, privilege; and their basis is constitutional law, overriding State common law; not as in Barr and Howard, Federal common

5. Federal policy looks with suspicion upon non-Indian attorneys for Indian tribes

The policy of protecting the private citizen's reputation and means of livelihood is, of course, one of State law. A Federal policy, however, also urges decision here in favor of the appellant against Littell. This Federal policy is not a general one drawn from the cases on Federal officers, but a specific policy relating to white attorneys for Indian tribes. Congress, from bitter experience, has little sympathy for this class of people.

Many years ago Congress took away from Indian tribes any independent authority which they may have had to engage attorneys, and made the tribe's hiring, the performance of tribal attorneys, and the payment of their fees subject to strict controls by the Secretary of the Interior. Acts of March 3, 1871, and May 21, 1872, R.S. §§ 2103-2106, 25 U.S.C. §§ 81-84. These statutes apply to all attorneys for Indian tribes. 25 C.F.R., parts 71 and 72. (The provisions dealing with tribes not organized under the Indian Reorganization Act are those applicable to the Navajo Tribe. See Request for Admission 9 and 10, T.R. 141, and answer, T.R. 156).

The legislative history of these Acts appears in House Report No. 98, 42nd Congress, 3rd Session (Serial 1578), which is a book of 793 pages, entitled "Investigation of Indian Frauds." The conclusion of the 42nd Congress,

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law providing a Federal official with a defense to a claim under State common law. The rules are not reciprocal:

> "For similar reasons, we reject any suggestion that in our references in *New York Times* . . . and *Garrison* . . . to Barr v. Matteo, 360 U.S. 564, mean that we have tried the *New York Times* rule to the rule of official privilege. The public interests protected by the New York Times rule are interests in discussion, not retaliation, and our reference to *Barr* should be taken to mean no more than that the scope of the privilege is to be determined by reference to the function it serves." Rosenblatt v. Baer, 383 U.S. 75, note 10 on page 84.

The New York Times rule obviously has no bearing on this appeal, except in relation to the counterclaim, which is not now before this court.

based upon exhaustive study, was that attorneys for Indian tribes were heartless scoundrels, unprincipled, avaricious, Godless robbers, cunning villains, cormorants, bankrupts in morals, religion and politics, self-serving traducers, disloyal mercenaries, spoilers, etc., etc. Each and every one of the above epithets is used generally and specifically in the House Report. For example (at page 76):

> "An Indian-claim agent is unlike most other people. He is generally bankrupt in morals, religion and politics; he will make unconscionable demands for the most imaginary services; he will make any kind of representation to the Indians against the character of his own people and government that, in his judgment, will over-reach his clients; will magnify his own importance and traduce others . . . Will threaten others in order to carry his point . . . [page 77]. In short, if there is anything that an Indian-claim agent will not do, it is that he will not treat his clients, the Indians, honestly."

Congress believed that attorneys for Indian tribes were completely untrustworthy and had to be watched like hawks. The history of Littell's relations to the Navajos (see footnote 14 above) proves that the belief is still justified in some cases. Tribal counsel were to receive none of the professional confidence accorded to other lawyers. They were not trusted to negotiate freely with their clients, nor to bill them or receive payment from them without the closest Federal supervision. Even the normal attorney-client privilege of confidentiality has been abrogated by 25 U.S.C. § 82, which requires sworn service records to be submitted to the Commissioner of Indian Affairs by tribal lawyers "showing each particular act of service . . . giving date and fact in detail." The Indian lawyer, one of whose principal activities is to prosecute claims against the United States, thus must report to an officer of his adversary everything he has done for his client, officer work as well as public appearances in court.

With such statutes in force, no tribal attorney can claim the high privilege of a public officer. He cannot even legitimately claim the respect of an ordinary practicing lawyer. The presumption of trustworthiness of the Federal officer, which underlies the *Gregoire* rule, is wholly lacking.

V. CONCLUSION

An unworthy member of the bar was engaged by contract to perform specified services for an Indian tribe. By a course of overreaching and bullying usurpation he achieved the status of "chief non-Indian adviser . . . in matters of policy as well as of law." The plaintiff, an honest young man, stood in his way: and to remove him he destroyed the young man's reputation and professional standing with his client. The appellant, unlike the unworthy member of the bar, did not sue a tribal official to keep his job; he sued the slanderous tribal attorney for damages.

The court below, in an unprecedented decision, has given the unworthy attorney absolute immunity from his malicious lies, but required the young lawyer to stand trial on a charge of libel for exposing the other attorney.

Such a decision is new law and bad law. Since the question is novel, its decision is a policy choice. Both State and Federal policy require reversal.

While the Secretary of the Interior and the District of Columbia circuit have already removed Littell from the opportunity for further depredations against the Navajos, they have not compensated his victims.

One of them here pleads for justice.

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LAURENCE DAVIS
Attorney

Certificate of Service

I hereby certify that I served three copies of the foregoing brief upon counsel for the appellee this date, by mailing the same, postage prepaid, addressed as follows:

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